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(unrevised)

143468

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF INDIANA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
STATE OF INDIANA

Plaintiff,

v.

_____, INC.

Defendants.

CIVIL ACTION NO.

CONSENT DECREE

I.

BACKGROUND

The United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9605, placed the Northside Sanitary Landfill (NSL) on the National Priorities List, 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 21, 1984, 49 Fed. Reg. 37,070-37,090. NSL is a "Facility" as specifically defined in Section IV, Paragraph D, of this Consent Decree and is located in Union Township, Boone County, approximately 5 miles north of Zionsville, Indiana.

In response to a release or a substantial threat of a release of a hazardous substance at or from the Facility, the U.S. EPA commenced a Remedial Investigation and Feasibility

Study ("RIFS"), for the Facility pursuant to 40 C.F.R. 300.68. The U.S. EPA completed a Remedial Investigation ("RI") Report in March 1986. In December 1986 U.S. EPA completed a Feasibility Study ("FS") for NSL. U.S. EPA also prepared a Combined Alternative Analysis (CAA) for NSL and the Environmental Conservation and Chemical Corp. (ECC) site adjacent to NSL. The CAA Report contained a proposed plan for remedial action at the Facility and ECC.

In December 1986, U.S. EPA, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, published notice of the completion of the RIFS, the CAA and of the proposed plan for remedial action. U.S. EPA provided opportunity for public comment to be submitted in writing to U.S. EPA by February 28, 1987, or orally at a public meeting held in the City of Zionsville, Indiana on December 17, 1986. U.S. EPA, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, has kept a transcript of the public meeting and has made this transcript available to the public as part of the administrative record located at U.S. EPA, Region V, 230 South Dearborn Street, Chicago, Illinois and at the Zionsville Town Hall, 110 South 4th Street, Zionsville, Indiana 46077.

In January 1987, U.S. EPA, pursuant to Section 122 of CERCLA, 42 U.S.C. § 9622, notified certain parties that the U.S. EPA determined each party to be a potentially responsible party ("PRP") regarding the proposed remedial action at the Facility.

In accordance with Section 121 (f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), U.S. EPA notified the State of Indiana on February 6, 1987, of negotiations with PRPs regarding the scope of the remedial design and remedial action for the Facility, and U.S. EPA has provided the State with an opportunity to participate in such negotiations and be a party to any settlement.

Certain persons have provided comments on U.S. EPA's proposed plan for remedial action, and to such comments U.S. EPA provided a summary of responses, all of which have been included in the administrative record referred to above. Considering the proposed plan for remedial action and the public comments received, U.S. EPA has reached a decision on a final remedial action plan, which is embodied in a document called a Record of Decision ("ROD") signed by the Regional Administrator on September 25, 1987, to which the State has given its concurrence, and which includes a discussion of U.S. EPA's reasons for the final plan and for any significant changes from the proposed remedial action plan contained in the CAA.

The defendant signatories to this Consent Decree ("Settling Defendants", as defined in Section IV, Paragraph N, of this Consent Decree) are in agreement with U.S. EPA's final remedial action plan and the ROD, as amended _____, _____.

U.S. EPA, pursuant to Section 117(b) of CERCLA, 42 U.S.C. § 9617(b), has provided public notice of adoption of the final

remedial action plan, as modified in response to public comments, embodied in the form of the ROD, including notice of the ROD's availability to the public for review in the same locations as the administrative record referred to above. Pursuant to Section 117(d) of CERCLA, 42 U.S.C. §9617(d), the notice has been published in a major local newspaper of general circulation and the notice includes an explanation of any significant changes and the reasons for such changes from the proposed remedial action contained in the FS.

Pursuant to Section 121(d)(1) of CERCLA, 42 U.S.C. §9821(d)(1), U.S. EPA, the State, and Settling Defendants ("the Parties") believe that the remedial action plan adopted by U.S. EPA will attain a degree of cleanup of hazardous substances, pollutants and contaminants released into the environment and of control of further release which, at a minimum, assures protection of human health and the environment at the Facility. The Parties believe the remedial action plan adopted by U.S. EPA will provide a level or standard of control for such hazardous substances, pollutants, or contaminants which at least attains legally applicable or relevant and appropriate standards, requirements, criteria, or limitations under Federal environmental law or facility siting law in accordance with Section 121 of CERCLA, 42 U.S.C. § 9621(d)(2).

Settling Defendants agree to implement the remedy adopted by U.S. EPA in the amended ROD as set forth in Appendix A to this Consent Decree, and incorporated by reference into this

Decree, and U.S. EPA has determined that the work required under the Consent Decree will be done properly by Settling Defendants, and that Settling Defendants are qualified to implement the remedial action plan contained in the ROD. The Parties recognize and intend to further hereby the public interest in the expedition of the cleanup of the Facility and, at the same time, avoid prolonged and complicated litigation between the Parties.

NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

II.

JURISDICTION

This Court has jurisdiction over the subject matter herein, and over the parties consenting hereto. Settling Defendants shall not challenge this Court's jurisdiction to enter and enforce this Consent Decree.

III.

PARTIES BOUND

This Consent Decree applies to and is binding upon the undersigned parties and their successors and assigns. The undersigned representative of each party to this Consent Decree certifies that he or she is fully authorized by the party or parties whom she or he represents to enter into the terms and conditions of the Consent Decree and to execute and legally bind that party to it. Settling Defendants shall provide a copy of this Consent Decree to the contractor hired to perform the work

required by this Consent Decree and shall require the contractor to provide a copy thereof to any subcontractor retained to perform any part of the work required by this Consent Decree.

IV.

DEFINITIONS

Whenever the following terms are used in this Consent Decree and the Exhibits and Appendix attached hereto, the following definitions specified in this Paragraph shall apply:

A. "Architect" or "Engineer" means the company or companies retained by the Settling Defendants to prepare the construction plans and specifications necessary to accomplish the remedial action described in the ROD and Scope of Work which is attached to this Consent Decree as Appendix B.

B. "Contractor" means the company or companies retained by or on behalf of Settling Defendants to undertake and complete the work required by this Consent Decree. Each contractor and subcontractor shall be deemed to be related by contract to each Settling Defendant within the meaning of 42 U.S.C. §9607(b).

C. "Consent Decree" means this Decree and all appendices hereto.

D. "Facility" refers to the location where treatment, storage, disposal or other placement of hazardous substances was conducted by Northside Sanitary Landfill, Inc., which facility is located within Union Township, Boone County, approximately 5 miles north of Zionsville, Indiana, as shown on the map in the attached Appendix B.

E. "Future liability" refers to liability arising after U.S. EPA's Certification of Completion is issued pursuant to Section XXV.

F. "Hazardous substance" shall have the meaning provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

G. "IDEM" means the Indiana Department of Environmental Management.

H. "National Contingency Plan" shall be used as that term is used in Section 105 of CERCLA, 42 U.S.C. § 9605.

I. "Owner Settling Defendant" refers to and Jonathan and Patricia Bankert, Northside Sanitary Landfill, Inc., Jonathan Bankert, Jr.

J. "Parties" means the United States of America, the State of Indiana, and the Settling Defendants.

K. "Plaintiffs" means the United States of America and the State of Indiana, and their agencies and departments.

L. "Response Costs" means any costs incurred by Plaintiffs pursuant to 42 U.S.C. § 9601 et seq.

M. "Statement of Work" or "SOW" means the statement of work for implementation of the remedial design, remedial action, and operation and maintenance of the remedial action at the Facility, as set forth in Appendix B.

N. "Settling Defendants" means those parties other than the United States of America and the State who sign this Consent Decree.

O. "State" means the State of Indiana.

P. "United States" means the United States of America.

Q. "U.S. EPA" means the United States Environmental Protection Agency.

R. "U.S. DOJ" means the United States Department of Justice.

S. "Waste Material" means any hazardous substance, as defined by 42 U.S.C. § 9601(14) and any associated contaminated material, pollutant or contaminant as defined by 42 U.S.C. § 9601(33).

T. "Work" means the design, construction and implementation, in accordance with this Consent Decree, of the tasks described in the ROD, this Decree, the Statement of Work attached hereto, and any schedules or plans required to be submitted pursuant thereto.

V.

GENERAL PROVISIONS

A. Commitment of Plaintiffs and Settling Defendants:

1. Settling Defendants shall jointly and severally finance and perform the Work as defined in Section IV, Paragraph T of this Consent Decree.

2. The Work as defined in Section IV, Paragraph T hereof, shall be completed in accordance with all requirements of this Decree, the ROD and the SOW including the standards, specifications and the time periods set forth in Section VI hereof and in the SOW.

B. Permits and Approvals:

1. All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable local, state and federal laws, regulations and permits. The United States and the State have determined that the obligations and procedures authorized under this Consent Decree are consistent with the authority of the United States and the State under applicable law to establish appropriate remedial measures for the Facility.

2. The United States and the State have determined that no federal, state, or local permits are required for work conducted entirely on-site as described in the SOW. Settling Defendants shall obtain all permits or approvals necessary for off-site work under federal, state or local laws and shall submit timely applications and requests for any such permits and approvals.

3. The standards and provisions of Section XIII hereof describing Force Majeure shall govern delays in obtaining permits required for the Work and also the denial of any such permits.

4. Settling Defendants shall include in all contracts or subcontracts entered into for work required under this Consent Decree, provisions stating that such contractors or subcontractors, including their agents and employees, shall

comply with all applicable laws and regulations in performing all activities required by such contracts or subcontracts. This Consent Decree is not, nor shall it act as, nor is it intended by the Parties to be, a permit issued pursuant to any federal or state statute or regulation.

C. Conveyance of the Facility

1. Within thirty days of approval by the Court of this Decree, Jonathan and Patricia Bankert, as Settling Defendants and owners of the Facility (the "Owner Settling Defendants"), shall record a copy of this Decree with the Recorder's Office, Boone County, State of Indiana.

2. The Facility, as described herein, may be alienated provided that at least sixty days prior to the date of such alienation, the Owner Settling Defendants notify Plaintiffs of such proposed alienation, the name of the grantee, and a description of the Owner Settling Defendants' obligations, if any, to be performed by such grantee. In the event of such alienation, all of Settling Defendants' obligations pursuant to this Decree shall continue to be met by all Settling Defendants and the grantee.

3. Any deed, title or other instrument of conveyance regarding the Facility shall contain a notice that the Facility is the subject of this Consent Decree, setting forth the style of the case, case number, and Court having jurisdiction herein.

VI.

PERFORMANCE OF THE WORK BY
SETTLING DEFENDANTS

A. All remedial design work to be performed by Settling Defendants pursuant to this Consent Decree shall be under the direction and supervision of a qualified professional architect or engineer. Prior to the initiation of remedial design work for the Facility, the Settling Defendants shall notify U.S. EPA and the State, in writing, of the name, title, and qualifications of any engineer or architect proposed to be used in carrying out the remedial design work to be performed pursuant to this Consent Decree.

B. Appendix B to this Consent Decree provides a Statement of Work (SOW) for the completion of remedial design and remedial action at the Facility. This Statement of Work is incorporated into and made an enforceable part of this Consent Decree.

C. The following work shall be performed:

1. Within 60 calendar days of the effective date of this Consent Decree, the Settling Defendants shall submit a work plan to the U.S. EPA and the State for the remedial design and remedial action at the Facility (RD/RA Work Plan). The RD/RA Work Plan shall be developed in conformance with the SOW, U.S. EPA Superfund Remedial Design and Remedial Action Guidance,

and any additional guidance documents provided by U.S. EPA.

2. The RD/RA Work Plan submittal shall include, but not be limited to, a schedule for submittal of the following project plans: (1) a sampling and analysis plan; (2) a health and safety/contingency plan; (3) a plan for satisfaction of permitting requirements; (4) a quality assurance project plan; (5) a groundwater monitoring plan; and (6) an operations and maintenance plan. The RD/RA Work Plan shall also include a schedule for implementation of the RD/RA tasks and submittal of RD/RA reports.

3. The RD/RA Work Plan and other required documents and reports (hereinafter referred to as "document(s)") shall be subject to review, modification and approval by U.S. EPA in consultation with the State.

4. Within 45 calendar days of receipt of any document, the U.S. EPA Remedial Project Manager will attempt to notify Settling Defendants, in writing, of approval or disapproval of the document, or any part thereof. In the event that a longer review period is required, the U.S. EPA Remedial Project Manager shall notify Settling Defendants of that fact within 30 calendar days of receipt of the document. In the event of any disapproval, U.S. EPA shall specify, in writing, any deficiencies and required modifications to the document.

5. Within 30 calendar days of receipt of any U.S. EPA document disapproval, the Settling Defendants shall submit a revised document to U.S. EPA and the State which incorporates the U.S. EPA modifications or shall provide a notice of dispute pursuant to Section XIV below.

6. Settling Defendants shall proceed to implement the work detailed in the RD/RA Work Plan when the Work Plan is fully approved by U.S. EPA. Unless otherwise directed by U.S. EPA, the Settling Defendants shall not commence field activities until approval by U.S. EPA of the RD/RA Work Plan. The fully approved RD/RA Work Plan shall be deemed incorporated into and made an enforceable part of this Consent Decree. All work shall be conducted in accordance with the National Contingency Plan, the U.S. EPA Superfund Remedial Design and Remedial Action Guidance, and the requirements of this Consent Decree, including the standards, specifications and schedule contained in the RD/RA Work Plan.

7. The Parties acknowledge and agree that neither the SOW nor the RD/RA Work Plan constitutes a warranty or representation of any kind by Plaintiffs that the SOW or RD/RA Work Plan will achieve the performance goals and standards set forth in the ROD and shall not foreclose Plaintiffs from seeking performance of all terms and conditions of this Consent Decree, including the applicable cleanup standards.

VII.

U.S. EPA PERIODIC REVIEW TO ASSURE
PROTECTION OF HUMAN HEALTH AND ENVIRONMENT

A. To the extent required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, U.S. EPA shall review the remedial action at the Facility at least every five (5) years after the entry of this Consent Decree to assure that human health and the environment are being protected by the remedial action being implemented. If upon such review, U.S. EPA determines that further response action in accordance with Section 104 or 106 of CERCLA, 42 U.S.C. §§9604, 9606, is appropriate at the Facility, then, consistent with Paragraph XVIII of this Consent Decree, the U.S. EPA may take or require such action.

B. Settling Defendants shall be provided with an opportunity to confer with U.S. EPA and the State on any response action proposed as a result of U.S. EPA's 5-year review and to submit written comments for the record. After the period for submission of written comments is closed, the Regional Administrator of U.S. EPA, Region V, shall in writing either affirm, modify or rescind the order for further response action. The final decision of U.S. EPA shall be subject to judicial review pursuant to the dispute resolution provisions in Section XIV to

the extent permitted by Section 113 of CERCLA, 42 U.S.C. §9613.

VIII.

ADDITIONAL WORK

A. In the event that U.S. EPA or the Settling Defendants determine that additional work, including additional remedial design or remedial action, is necessary to meet the Performance or Clean-up Standards described in Section VI above, notification of such additional work will be provided to the other Project Coordinator.

B. Any additional work determined to be necessary by Settling Defendants is subject to approval by U.S. EPA.

C. Any additional work determined to be necessary by Settling Defendants and approved by U.S. EPA or determined to be necessary by U.S. EPA to meet the Performance or Clean-up Standards shall be completed by Settling Defendants in accordance with the standards, specifications, and schedules approved by U.S. EPA.

IX.

QUALITY ASSURANCE

Settling Defendants shall use quality assurance, quality control, and chain of custody procedures in accordance with U.S. EPA's "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plans," (QAM-005/80) and subsequent amendments to such guidelines upon notification to Settling Defendants of such amendments by U.S. EPA. Prior to the

commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit a Quality Assurance Project Plan ("QAPP") to U.S. EPA and the State that is consistent with the SOW and applicable guidelines. U.S. EPA, after review of Settling Defendants' QAPP(s) and the State's comments thereon, will notify Settling Defendants of any required modifications, conditional approval, disapproval, or approval of the QAPP(s). Upon notification of disapproval or any need for modifications, Settling Defendants shall make all required modifications in the QAPP subject to the dispute resolution provisions of Section XIV. Sampling data generated consistent with the QAPP shall be admissible as evidence, without objection, in any proceeding under Section XIV of this Decree. Settling Defendants shall assure that U.S. EPA personnel or authorized representatives are allowed access to any laboratory utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall have a designated laboratory analyze samples submitted by U.S. EPA for quality assurance monitoring.

X.

FACILITY ACCESS, SAMPLING, DOCUMENT AVAILABILITY

A. To the extent that the Facility or other areas where Work is to be performed hereunder is presently owned by parties other than those bound by this Consent Decree, Settling Defendants shall obtain access agreements from the present owners within

thirty (30) calendar days of entry of this Consent Decree for purposes of implementing the requirements of this Decree. Such agreement shall provide access for U.S. EPA, the State and authorized representatives of U.S. EPA and the State. If such access agreements are not obtained within the time specified herein, Settling Defendants shall so notify U.S. EPA and the State, and Settling Defendants shall use their best efforts including the seeking of judicial assistance if necessary, to otherwise secure access to the necessary areas.

B. Settling Defendants shall make available to U.S. EPA and the State the results of all sampling and/or tests or other data generated by Settling Defendants with respect to the implementation of this Consent Decree, and shall submit these results in monthly progress reports as described in Section XI of this Consent Decree.

C. At the request of U.S. EPA or the State, Settling Defendants shall allow split or duplicate samples to be taken by U.S. EPA, the State and/or their authorized representatives, of any samples collected by Settling Defendants pursuant to the implementation of this Consent Decree. Settling Defendants shall notify U.S. EPA and the State not less than fourteen (14) days in advance of any sample collection activity. In addition, U.S. EPA and the State shall have the right to take any additional samples that U.S. EPA or the State deems necessary.

XI.

REPORTING REQUIREMENTS

A. Settling Defendants shall require the contractor to prepare and provide to U.S. EPA and the State written monthly progress reports which: (1) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (2) include all results of sampling and tests and all other data received by Settling Defendants during the course of the Work; (3) include all plans and procedures completed under the RD/RA Work Plan during the previous month; (4) describe all actions, data and plans which are scheduled for the next month and provide other information relating to the progress of construction as is customary in the industry; (5) include information regarding percentage of completion, unresolved delays encountered, or anticipated, that may affect the future schedule for implementation of RD/RA Statement of Work or Work Plan, and a description of efforts made to mitigate those delays or anticipated delays. These progress reports are to be submitted to U.S. EPA and the State by the tenth day of every month following the effective date of this Consent Decree.

B. If the date for submission of any item or notification required by this Consent Decree falls upon a weekend or state or federal holiday, the time period for submission of that item or notification is extended to the next business day following the weekend or holiday.

C. Upon the occurrence of any event during performance of the Work which, pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, requires reporting to the National Response Center, Settling Defendants shall promptly orally notify the U.S. EPA Project Manager ("RPM"), or On-Scene Coordinator ("OSC"). In the event of the unavailability of the U.S. EPA RPM, Settling Defendant shall notify the Emergency Response Section, Region V, United States Environmental Protection Agency. The above notification is in addition to the reporting required by Section 103. Within 20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiffs a written report setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken to respond thereto.

XII.

REMEDIAL PROJECT MANAGER/PROJECT COORDINATORS

A. U.S. EPA shall designate a Remedial Project Manager ("RPM") and/or an On-Scene Coordinator ("OSC"), and the State shall designate a Project Coordinator for the Facility, and the Plaintiffs may designate other representatives, including U.S. EPA and State employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. The RPM/OSC shall have the authority lawfully vested in an RPM/OSC by the National

Contingency Plan, 40 CFR Part 300. In addition, the RPM/OSC shall have authority to halt, conduct, or direct any work required by this Consent Decree and to take any necessary response action when conditions at the facility may present an imminent and substantial endangerment to public health or welfare or the environment. Settling Defendants shall also designate a Project Coordinator who shall have primary responsibility for implementation of the Work at the Facility.

B. To the maximum extent possible, except as specifically provided in the Consent Decree, communications between Settling Defendants, the State and U.S. EPA concerning the terms and conditions of this Consent Decree shall be made between the Project Coordinators and the RPM/OSC.

C. Within twenty (20) calendar days of the effective date of this Consent Decree, Settling Defendants, the State and U.S. EPA shall notify each other, in writing, of the name, address and telephone number of the designated Project Coordinator and an Alternate Project Coordinator or RPM and Alternate RPM/OSC.

XIII.

FORCE MAJEURE

A. "Force Majeure" for purposes of this Consent Decree is defined as any event arising from causes entirely beyond the control of Settling Defendants which delays or prevents the performance of any obligation under this Consent Decree. "Force

"Majeure" shall not include increased costs or expenses or non-attainment of the Performance or Clean-Up standards set forth in Section VI hereof, the ROD and the Statement of Work.

B. When circumstances occur which may delay the completion of any phase of the Work or delay access to the Facility or to any property on which any part of the Work is to be performed, whether or not caused by a "force majeure" event, Settling Defendants shall promptly notify the RPM and the State Project Coordinator by telephone or, in the event of their unavailability, the Director of the Waste Management Division of U.S. EPA. Within five (5) days of the event which Settling Defendants contend is responsible for the delay, Settling Defendants shall supply to Plaintiffs in writing the reason(s) for and anticipated duration of such delay, the measures taken and to be taken by Settling Defendants to prevent or minimize the delay, and the timetable for implementation of such measures. Failure to give oral notice to the RPM and State Project Coordinator and to give written explanation to Plaintiffs in a timely manner shall constitute a waiver of any claim of force majeure.

C. If U.S. EPA agrees that a delay is or was attributable to a "force majeure" event, the Parties shall modify the RD/RA Work Plan to provide such additional time as may be necessary to allow the completion of the specific phase of Work and/or any succeeding phase of the Work affected by such delay, with

such additional time not to exceed the actual duration of the delay.

D. If U.S. EPA and Settling Defendants cannot agree whether the reason for the delay was a "force majeure" event, or whether the duration of the delay is or was warranted under the circumstances, the Parties shall resolve the dispute according to Section XIV hereof. Settling Defendants have the burden of proving force majeure as a defense to compliance with this Consent Decree.

XIV.

DISPUTE RESOLUTION

A. As required by Section 121(e)(2) of CERCLA, the Parties to this Consent Decree shall attempt to resolve expeditiously and informally any disagreements concerning implementation of this Consent Decree or any Work required hereunder.

B. In the event that any dispute arising under this Consent Decree is not resolved expeditiously through informal means, any party desiring dispute resolution under this Paragraph shall give prompt written notice to the other parties to the Decree.

C. Within ten (10) days of the service of notice of dispute pursuant to the Paragraph B above, the party who gave the notice shall serve on the other parties to this Decree a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis

or opinion supporting its position, and all supporting documentation on which such party relies (hereinafter the "Statement of Position"). Opposing parties shall serve their Statements of Position, including supporting documentation, no later than ten (10) days after receipt of the complaining party's Statement of Position. In the event that these 10-day time periods for exchange of Statements of Position may cause a delay in the Work, they shall be shortened upon and in accordance with notice by U.S. EPA.

D. An administrative record of any dispute under this Section shall be maintained by U.S. EPA. The record shall include the written notification of such dispute, the Statement of Position served pursuant to the preceding paragraphs, and any other review by all parties.

E. Upon review of the administrative record, the Director of the Waste Management Division, U.S. EPA, Region V, shall issue a final decision and order resolving the dispute. This order shall be enforceable administratively pursuant to Section 121(e)(2) of CERCLA, 42 U.S.C. § 9121(e)(2), subject to the rights of judicial review set forth in Paragraph F below.

F. Until the date of termination of this Consent Decree specified in Section XXV below, any decision and order of U.S. EPA pursuant to Paragraph E above shall be reviewable by this Court, provided that a Notice of Judicial Appeal is filed within 10 days of receipt of U.S. EPA's decision and order.

In any event, judicial review will be conducted on the administrative record, using an arbitrary and capricious standard.

G. The invocation of the procedures stated in this Section shall not extend or postpone Settling Defendants' obligations under this Consent Decree with respect to the disputed issue unless and until U.S. EPA finds, or the Court orders, otherwise.

XV.

RETENTION AND AVAILABILITY OF INFORMATION

A. Settling Defendants shall make available to U.S. EPA and the State and shall retain, during the pendency of this Consent Decree and for a period of ten (10) years after its termination, all records and documents in their possession, custody, or control which relate to the performance of this Consent Decree, including, but not limited to, documents reflecting the results of any sampling, tests, or other data or information generated or acquired by any of them, or on their behalf, with respect to the Facility and all documents pertaining to their own or any other person's liability for response action or costs under CERCLA. After the ten (10) year period of document retention, Settling Defendants shall notify U.S. DOJ, U.S. EPA and the State at least ninety (90) calendar days prior to the destruction of any such documents, and upon request by U.S. EPA or the State, Settling Defendants shall relinquish custody of the documents to

U.S. EPA or the State.

B. Settling Defendants may assert business confidentiality claims covering part or all of the information provided in connection with this Consent Decree in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and pursuant to 40 C.F.R § 2.203(b) and applicable State law.

C. Information determined to be confidential by U.S. EPA will be afforded the protection specified in 40 C.F.R Part 2, Subpart B and, if determined to be entitled to confidential treatment under State law by the State, afforded protection under State law by the State. If no such claim accompanies the information when it is submitted to the U.S. EPA and the State, the public may be given access to such information without further notice to Settling Defendants.

D. Information acquired or generated by Settling Defendants in performance of the Work that is subject to the provisions of Section 104(e)(7)(F) of CERCLA, 42 U.S.C. § 9604(e)(7)(F), shall not be claimed as confidential by Settling Defendants.

XVI.

REIMBURSEMENT

A. Settling Defendants shall pay, within 45 days of the entry of this Consent Decree, _____ dollars to the EPA Hazardous Substances Superfund delivered to the EPA Superfund, P.O. Box 371003M, Pittsburgh, Pennsylvania, 15251, in the

form of a certified or cashier's check payable to "EPA Hazardous Substances Superfund," and a copy of such check shall be sent to the Director, Waste Management Division, U.S. EPA, Region V.

B. The payments made under Paragraph A above are reimbursement of past costs claimed by the United States in this action. In consideration of the monies received under the above Paragraph, the United States covenants not to sue Settling Defendants for any costs incurred prior to the entry date of this Consent Decree, pursuant to CERCLA, 42 U.S.C. § 9601 et seq.

C. Settling Defendants shall pay all oversight costs of the United States and the State incurred after the entry of this Consent Decree in overseeing implementation of the Work. Payments shall be made on an annual basis and within 30 days of the submission of itemized cost statements and supporting documentation by the United States and the State. The United States and the State shall submit their oversight cost claims as soon as practicable after each anniversary date of this Consent Decree. Payment shall be made as specified in Paragraph A above.

D. In consideration of and upon payment of all oversight costs as required by this Section, the United States and the State covenant not to sue for any oversight costs incurred in overseeing the Work.

E. If oversight costs are outstanding at the time the United States and the State plan to terminate this Consent Decree, Settling Defendants shall, within thirty (30) days of the submission of an itemized cost statement and supporting documentation by the United States and the State, and before termination of this Consent Decree, pay such oversight costs.

F. The Response Costs set forth in Paragraph A of this Section are not inconsistent with the National Contingency Plan.

G. Settling Defendants further acknowledge that the State claims that the total past Response Costs incurred by it prior to the entry of this Consent Decree and natural resource damages suffered by it in connection with the Facility total \$_____.

H. Settling Defendants shall pay within forty-five (45) days of the entry of this Consent Decree, \$_____ to the State by means of a check made payable to "_____" and delivered to the Attorney General of the State.

I. The Response Costs set forth in Paragraph H above were incurred by the State and are not inconsistent with the National Contingency Plan.

XVII.

STIPULATED PENALTIES

A. Settling Defendants shall pay stipulated penalties in the amount set forth in Paragraph H below to the United States

for each violation of the requirements of Section V hereof or the RD/RA Work Plan approved pursuant to this Consent Decree, unless U.S. EPA determines that such failure is excused under Section XIII ("Force Majeure"). Violations by Settling Defendants shall include any failure to complete an activity under this Consent Decree, or a plan approved under this Consent Decree, or any matter under this Consent Decree, in an acceptable manner and within the specified time schedules approved under this Consent Decree. Any modifications of the time for performance shall be in writing and approved by U.S. EPA.

B. All penalties begin to accrue on the day that complete performance is due or a violation occurs, and continue to accrue through the final day of correction of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

C. Following U.S. EPA's determination that Settling Defendants have failed to comply with the requirements of this Consent Decree, U.S. EPA shall give Settling Defendants written notification of the same and describe the non-compliance. This notice shall also indicate the amount of penalties due.

D. All penalties owed to the United States under this Section shall be payable within 30 days of receipt of the notification of non-compliance, unless Settling Defendants invoke the dispute resolution procedures under Section XIV.

Penalties shall accrue from the date of violation regardless of whether U.S. EPA has notified Settling Defendants of a violation. Interest shall begin to accrue on the unpaid balance at the end of the 30-day period pursuant to Paragraph K of this Section. Such penalties shall be paid by certified check to the "EPA Hazardous Substances Superfund" and shall contain Settling Defendants' complete and correct address, the site name, and the civil action number. All checks shall be mailed to the EPA Superfund, P.O. Box 37100M, Pittsburgh, Pennsylvania 15251.

E. Neither the filing of a petition to resolve a dispute nor the payment of penalties shall alter in any way Settling Defendants' obligation to complete the performance required hereunder.

F. Settling Defendants may dispute Plaintiffs' right to the stated amount of penalties by invoking the dispute resolution procedures under Section XIII. Penalties shall accrue but need not be paid during the dispute resolution period. If the District Court becomes involved in the resolution of the dispute, the period of dispute shall end upon the rendering of a decision by the District Court regardless of whether any party appeals such decision. If Settling Defendants do not prevail upon resolution, Plaintiff has the right to collect all penalties which accrue prior to and during the period of dispute. In the event of an appeal, such penalties shall be placed into an escrow account until a decision has been rendered by the final court of appeal. If

Settling Defendants prevail upon resolution, no penalties shall be payable.

G. No penalties shall accrue for violations of this Consent Decree caused by events determined by U.S. EPA to be beyond the control of Settling Defendants as identified in Section XIII ("Force Majeure"). Settling Defendants have the burden of proving force majeure or compliance with this Consent Decree.

H. The following stipulated penalties shall be payable per violation per day to the United States for any non-compliance identified in Paragraph A above.

<u>Amount/Day</u>	<u>Period of Noncompliance</u>
\$ 5,000	1st thru 14th day
10,000	15th thru 30th day
15,000	31st day and beyond

I. No payments made under this Section shall be tax deductible.

J. This Section shall remain in full force and effect for the term of this Consent Decree.

K. Pursuant to 31 U.S.C. §3717, interest shall accrue on any amounts overdue at a rate established by the Department of Treasury for any period after the date of billing. A handling charge will be assessed at the end of each 30 day late period, and a six per cent per annum penalty charge will be assessed

if the penalty is not paid within 90 days of the due date.

L. If Settling Defendants fail to pay stipulated penalties, Plaintiff may institute proceedings to collect the penalties. Notwithstanding the stipulated penalties provisions of this Section, U.S. EPA may elect to assess civil penalties and or to bring an action in U.S. District Court pursuant to Section 109 of CERCLA, 42 U.S.C. §9609, to enforce the provisions of this Consent Decree. Payment of stipulated penalties shall not preclude U.S. EPA from electing to pursue any other remedy or sanction to enforce this Consent Decree, and nothing shall preclude U.S. EPA or the State from seeking statutory penalties against Settling Defendants for violations of statutory or regulatory requirements.

XVIII.

COVENANT NOT TO SUE

A. In consideration of actions which will be performed and payments which will be made by the Settling Defendants under the terms of the Consent Decree, and except as otherwise specifically provided in this Decree, the United States and the State covenant not to sue the Settling Defendants or their officers, directors, employees, or agents for Covered Matters. Covered Matters shall include any and all claims available to Plaintiff under Sections 106 and 107 of CERCLA, 42 U.S.C. §9606, 9607, and Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6973, and any and all claims available to the State under

_____ and common law nuisance on the facts surrounding the transactions or occurrences as described in Plaintiffs' complaint against the Settling Defendants. With respect to future liability, this covenant not to sue shall take effect upon certification by U.S. EPA of the completion of the remedial action concerning the Facility.

B. "Covered Matters" do not include:

- (1) Liability arising from hazardous substances removed from the Facility;
- (2) Natural Resource damages;
- (3) Criminal liability;
- (4) Claims based on a failure by the Settling Defendants to meet the requirements of this Consent Decree;
- (5) Any matters for which the United States is owed indemnification under Section XIX hereof; and
- (6) Liability for violations of Federal or State law which occur during implementation of the remedial action.

C. Notwithstanding any other provision in this Consent Decree, (1) the United States reserves the right to institute proceedings in this action or in a new action or to issue an Order seeking to compel the Settling Defendants to perform any additional response work at the Facility and (2) the United States and the State reserve the right to institute proceedings in this action or in a new action seeking to reimburse the United States for its response costs and to reimburse the State

for its matching share of any response action undertaken by U.S. EPA or the State under CERCLA, relating to the Facility, if:

- a. For proceedings prior to U.S. EPA certification of completion of the remedial action concerning the Facility,

- (i) conditions at the Facility, previously unknown to the United States, are discovered after the entry of this Consent Decree, or

- (ii) information is received, in whole or in part, after the entry of this Consent Decree,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment; and

- b. For proceedings subsequent to U.S. EPA certification of completion of the remedial action concerning the Facility,

- (i) conditions at the Facility, previously unknown to the United States, are discovered after the certification of completion by U.S. EPA, or

- (ii) information is received, in whole or in part, after the certification of completion by U.S. EPA,

and these previously unknown conditions or this information indicates that the remedial action is not protective of human health and the environment.

D. Notwithstanding any other provision in this Consent Decree, the covenant not to sue in this Section shall not relieve the Settling Defendants of their obligation to meet and maintain compliance with the requirements set forth in this Consent Decree, including the conditions in the ROD, which are

incorporated herein, and the United States reserves its rights to take response actions at the Facility in the event of a breach of the terms of this Consent Decree and to seek recovery of costs incurred after entry of the Consent Decree: 1) resulting from such a breach; 2) relating to any portion of the Work funded or performed by the United States; or 3) incurred by the United States as a result of having to seek judicial assistance to remedy conditions at or adjacent to the Facility.

E. Nothing in this Consent Decree shall constitute or be construed as a release or a covenant not to sue regarding any claim or cause of action against any person, firm, trust, joint venture, partnership, corporation or other entity not a signatory to this Consent Decree for any liability it may have arising out of or relating to the Facility. Plaintiffs expressly reserve the right to continue to sue any person, other than the Settling Defendants, in connection with the Facility.

XIX.

INDEMNIFICATION; OTHER CLAIMS

A. Settling Defendants agree to indemnify, save and hold harmless U.S. EPA, the State and/or their representatives from any and all claims or causes of action arising from acts or omissions of Settling Defendants and/or their representatives in carrying out the activities pursuant to this Consent Decree. U.S. EPA and the State shall notify Settling Defendants of any

such claims or actions promptly after receipt of notice that such a claim or action is anticipated or has been filed. U.S. EPA and the State agree not to act with respect to any such claim or action without first providing Settling Defendants an opportunity to participate.

B. U.S. EPA and the State are not to be construed as parties to, and do not assume any liability for, any contract entered into by Settling Defendants in carrying out the activities pursuant to this Consent Decree. The proper completion of the Work under this Consent Decree is solely the responsibility of Settling Defendants.

C. Settling Defendants waive their rights to assert any claims against the Hazardous Substances Trust Fund under CERCLA that are related to any past costs or costs incurred in the Work performed pursuant to this Consent Decree, and nothing in this Consent Decree shall be construed as U.S. EPA's preauthorization of a claim against the Hazardous Substance Trust Fund.

XX.

INSURANCE/FINANCIAL RESPONSIBILITY

A. Settling Defendants shall purchase and maintain in force insurance policies in the maximum amount available, which shall protect the United States and the public against any and all liability arising out of Settling Defendants' and their Contractor and other agents' acts or omissions in performance of the

Work at the Facility. Prior to commencement of the Work at the Facility, Settling Defendants shall provide U.S. EPA with a certificate of insurance and a copy of the insurance policy for U.S. EPA's approval.

B. Settling Defendants shall provide financial security, in the form of [performance bond, letter of credit, corporate guarantee, etc.] in the amount of \$ _____ for completion of the Work at the Facility.

XXI.

NOTICES

A. Whenever, under the terms of this Consent Decree, notice is required to be given, a report or other document is required to be forwarded by one party to another, or service of any papers or process is necessitated by the dispute resolution provisions of Section XIV hereof, such correspondence shall be directed to the following individuals at the addresses specified below:

As to the United States or
U.S. EPA:

a. Regional Counsel
Attn: NSL
Coordinator (SCS)
U.S. Environmental
Protection Agency
230 S. Dearborn Street
Chicago, Illinois 60604

As to the State of Indiana

a. Attorney General
State of Indiana
Attn: NSL
Coordinator
Room 219 - State House
Indianapolis, Indiana 46204

- b. Director, Waste Management Division
Attn: NSL Remedial Project Manager (5HE)
U.S. Environmental Protection Agency
230 S. Dearborn Street
Chicago, Illinois 60604
- b. Director,
Indiana Department of Environmental Management
Attn: NSL Project Coordinator
105 South Meridian Street
P. O. Box 6015
Indianapolis, IN 46206-6015
- c. Assistant Attorney General
Land & Natural Resources Division
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
- As to Settling Defendants:

XXII.

CONSISTENCY WITH
NATIONAL CONTINGENCY PLAN

The United States and the State agree that the Work, if properly performed as set forth in Sections V and VI hereof, is consistent with the provisions of the National Contingency Plan pursuant to 42 U.S.C. § 9605.

XXIII.

RESPONSE AUTHORITY

Nothing in this Consent Decree shall be deemed to limit the response authority of the United States under 42 U.S.C. § 9604.

XXIV.

COMMUNITY RELATIONS

Settling Defendants shall cooperate with U.S. EPA and the State in providing information to the public regarding the progress of remedial design and remedial action at the Facility. As requested by U.S. EPA or the State, Settling Defendants shall participate in the preparation of all appropriate information disseminated to the public and in public meetings which may be held or sponsored by U.S. EPA or the State to explain activities at or concerning the Facility.

XXV.

EFFECTIVE AND TERMINATION DATES

A. This Consent Decree shall be effective upon the date of its entry by the Court.

B. Certification of Completion of Remedial Action

1. Application. When the Settling Defendants believe that the demonstration of compliance with Cleanup Standards has been made and that operation of groundwater collection system has been completed in accordance with this Consent Decree, they shall submit to the United States a Notification of Completion of Remedial Action and a final report which summarizes the work done, any modification made to the SOW or Work Plan(s) thereunder

relating to the Cleanup Standards, and data demonstrating that the Cleanup Standards have been achieved. The report shall include or reference any supporting documentation.

2. Certification. Upon receipt of the Notice of Completion of Remedial Action, U.S. EPA shall review the final report and any other supporting documentation, and the remedial actions taken. U.S. EPA shall issue a Certification of Completion of Remedial Action upon a determination that Settling Defendants have demonstrated compliance with Cleanup Standards as required by Section VI, that operation of the groundwater collection system in accordance with the terms of this Consent Decree has been completed and that no further corrective action is required.

C. Termination. Upon the filing of U.S. EPA's Certification of Completion pursuant to the preceding paragraph, and a showing that the other terms of this Consent Decree (other than the post-termination obligations referred to below), including payment of all costs and stipulated penalties due hereunder, have been complied with, this Consent Decree shall be terminated upon motion of either party. However, Settling Defendants' operation and maintenance obligations shall survive the termination of the Consent Decree and shall be enforceable by the United States by re-institution of this action or by institution of a

new action.

ENTERED this _____ day of _____, 19__.

U.S. District Judge

The parties whose signatures appear below hereby consent to the terms of this Consent Decree. The consent of the United States is subject to the public notice and comment requirements of 28 C.F.R. 50.7.

By: _____
ROGER J. MARZULLA
Acting Assistant Attorney
General
Land & Natural Resources
Division
U.S. Department of Justice
Washington, D. C. 20530

By: _____

Date: _____

Date: _____

By: _____
Thomas L. Adams, Jr.
Assistant Administrator
For Enforcement and
Compliance Monitoring
U.S. EPA

By: _____
Valdas V. Adamkus
Regional Administrator
U.S. EPA Region V

Date: _____

Date: _____

STATE OF _____

By: _____

Date: _____

SIGNATURES OF SETTLING DEFENDANTS: